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IN THE

Supreme Court of the United States

October Term, 1966

No. 881

BOYS TOWN, USA., INC., a Nevada corporation,
Petitioner,

vs.

THE WORLD CHURCH, a California corporation; JACKSON APPLIANCE, INC., a California corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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BOYS TOWN, USA., INC., a Nevada corporation,
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vs.

THE WORLD CHURCH, a California corporation; JACKSON APPLIANCE, INC., a California corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice Earl Warren and the Honorable Associates of the United States Supreme Court:

Boys Town, U.S.A., Inc., a Nevada corporation, Petitioner, prays that a Writ of Certiorari issue to reverse the judgment of the Court of Appeals for the Ninth Circuit affirming the summary judgment of the U.S. District Court for the Southern District of California.

OPINIONS BELOW

The opinion and findings of fact and order granting summary judgment and motion to dismiss by defendant Jackson Appliance Company, Inc. are reproduced in Appendix A of this petition. It was not reported.

The opinion of the Court of Appeals for the Ninth Circuit is attached hereto as Appendix B.

The opinion of the District Court of Appeals of the State of California reported is attached hereto as Appendix C.

Contract for Sale and Purchase of Real Property dated April 13, 1959 between the World Church as Seller and Boys Town U.S.A., Inc. and Sunset Development Company as Purchaser is attached hereto as Appendix D.

Petition for hearing of the California Supreme Court in the State case was denied December 18, 1963.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment attached hereto as Appendix E.

Rule 8(c) Rules for the District Court of the U.S. Sec. 337, Cal. Code CCP Sec. 339 Cal. Code CCP, Rule 56 Rule of Civil Proc Dist. Ct. U.S. Seventh Amendment U.S. Constitution are also attached hereto as Appendix E.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254(1) U.S. Code.

The judgment of the Court of Appeals was entered August 10, 1965. Rehearing denied on September 28, 1965 in the said cause. Time for filing petition was extended to and including *January* 6, 1966 by Justice Fortas.

QUESTIONS PRESENTED

1. Whether a trial court can grant a motion for dismissal and summary judgment in the federal court as to two defendants where only one defendant has made such a motion which was based on the personal defense of limitations and *res judicata* based on a state court proceeding.

2. Whether trial court can grant a motion for dismissal and summary judgment where a dispute exists as to the effective date that a statute of limitations

would begin or is such a question of fact requiring a trial to determine that issue.

3. Whether interference with contractual relations is a continuing matter that prevents the statute of limitations from running until the last act of interference.

4. Whether a subsequent grantee of real property can assert the personal defenses of the statute of limitations and *res judicata* of the grantor against a prior contractee of sale of real property — either for himself or for the grantor, who is a co-defendant.

5. Where a defendant is a subsequent grantee of real property who continues to interfere with contractual relations between plaintifff and grantor-co-defendant up to the time of filing the action by plaintiff by asserting ownership of real property previously conveyed to plaintiff, can such defendant assert the statute of limitations as a defense to an action alleging interference with the original contract of sale between plaintiff and the grantor-defendant?

THE FACTS

On April 13, 1959, the respondent, World Church, as Seller, entered into a contract of sale of California real state with the petitioner involving property valued in the millions. Transfer of the deed was to be completed on July 24, 1959. On June 1, 1959, and on March 15, 1960, the World Church, the Seller, gave notice of the cancellation, termination and rescission of the contract to petitioner.

On March 28, 1960, petitioner commenced an action against the Church in the Superior Court of the State of California in and for the County of Ventura. The complaint in that action sought specific performance of the said contract of sale and also sought in the second cause of action, damages for the breach of said contract. A *lis pendens* upon the said real property was recorded on or about March 28, 1960, in said action, by petitioner.

On March 17, 1961, respondent Jackson Appliance, Inc., acquired title to the subject real property from the church subject to the rights and claims of petitioner against the World Church. On June 28, 1962, Jackson Appliance, Inc. intervened in the State court action in Ventura County and filed its answer in intervention. It alleged ownership of the subject real property, that it owed no amount in damages to petitioner and that there was no right in petitioner to specific performance of the contract. Prior to the

aforesaid intervention the respondent World Church had filed a motion for a summary judgment which had been denied by the trial court judge. The motion was denied on July 27, 1960, by the said trial judge. The memorandum of opinion of said judge is set out in Appendix A, of this petition. That on July 16, 1962, intervenor, Jackson Appliance, Inc. moved for summary judgment and dismissal of petitioner's action against defendant World Church. The same trial judge on July 23, 1962, granted said motion. The Court's remarks regarding the said judgment of dismissal, the minute order, and the judgment of trial court are attached at Appendix B and C.

The State Trial Court judgment was appealed to the District Court of Appeals for the State of California and on October 23, 1963, was affirmed at 221 C.A. 2d 468; 34 Cal. Rptr. 498. Petition for hearing by the Supreme Court of the State of California was denied December 18, 1963. An action was filed in the United States District Court, Southern District of California, Central Division, on February 26, 1964. The said action concerned the same real property that was described in the prior state action. The complaint is for damages for specific performance based on the same contract as that relied on in the former State Court action. The only allegation not in the amended complaint in the State court action is that Jackson Appliance, Inc. has interfered with petitioner's contract with the World Church and is liable for damages.

Jackson Appliance, Inc. was not mentioned in petitioner's original complaint in the State Court and the alleged transfer of the real property to said Jackson Appliance, Inc. did not occurr until 13 months after petitioner had commenced the State lawsuit.

Respondent Jackson Appliance, Inc. moved the Federal District Court to grant a summary judgment and to dismiss the Federal action on the grounds that the Federal action had previously been determined by the State Court and that the causes of action were barred by the Statute of Limitations. Such motion was made *solely* by Jackson Appliance, Inc. and the co-defendant World Church did not join in said motion. After a hearing in which both petitioner and Jackson Appliance Company, Inc. submitted affidavits, the Federal District Court granted said motion. The decision of the said trial court, findings of fact and order dismissing the action as to both Jackson Appliance, Inc. and the World Church are attached at Appendix AA.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit from the said judgment of dismissal. Said appeal was denied by the said appellate court August 10, 1965, at 349 F. 2d 576. Petitioner's motion for rehearing was denied on September 28, 1965. Application was granted to extend the time for filing, this petition for a writ of certiorari to review said judgment to and including Jan. 5, 1966 by Justice Fortas.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court affirming the District Court summary judgment is squarely against the California and federal law that defenses asserting the statute of limitations or *res judicata* are personal affirmative defenses which must be pleaded and tried.

Rule 8 (c) Rules of Pleading for the District Court of the United States.

Murphy v. Murphy, 71 C.A. 389, 199 P. Rptr. 861;

California etc. v. Sierra, etc. Company, 158 Cal. 690; 112 P. Rptr. 274;

Spitzer v. Superior Court, 74 C.A. 494; 241 P. Rptr. 270;

Schudel v. Helbing, 26 C.A. 410, 147 P. Rptr. 89;

Labor Inv. Corp. v. Russell, 405 Pac. (2) 1008.

In spite of the California law, as well as federal law, the Federal District Court and the Court of Appeals ignored the fact that the World Church had never asserted such personal defenses and dismissed the action as to the World Church and the co-defendant Jackson Appliance, Inc. The decision to dismiss as to both defendants when only one defendant had made such a motion was beyond the jurisdiction of the trial court, a denial of due process under the Fifth Amendment, U.S. Constitution, and constituted such

a departure from accepted court procedure as to require this court to exercise its power of supervision as is contemplated by Rule 19 (1)b of this court.

The decision of the 9th Circuit Court affirming the District Court finding that the action of petitioner against respondent Jackson Appliance Co., Inc. for interference with the land contract between Petitioner and respondent World Church was controlled by Sec. 339 of the Code of Civil Procedure (a two year statute of limitation) ignored two questions. 1. Where there were continued acts in interference with the contract, can petitioner rely solely on acts occurring within two years prior to filing the Federal Complaint to avoid the Statute of Limitations defence? Is he bound by the first acts of interference by respondent Jackson which occurred more than two years before said filing. 2. Where respondents contested the state action appeal, should that period of appeal be allowed to toll the statutory period, according to California law?

Petitioner contends that the acts of respondent Jackson Appliance Co., Inc. in intervening in the original state action, then moving for summary judgment, (which had previously been denied by the court as to respondent World Church) and resisting petitioner's appeal (beginning July 2nd, 1962 and continuing until denial of a hearing of the appeal by the California Supreme Court on December 18th, 1963 only slightly more than two months before the original Fed-

eral Action was filed on Feb. 26th, 1964, all constituted acts of interference within the two year statutory period. Acts in interference with contract can be actionable even though done by lawful means.

Wise v. S. P. Co., 223 C.A. 2d 50;
Herron v. State Farm Mutual Ins., 56 C. 2d 202;
Imperial Ice Co. v. Possier 18 Cal. (2) 33;
Ellsbach v. Mulligan, 58 Cal. App. (2) 354, 366;
4 U.C.L.A. L. Rev. 304, 306.

The Statute of Limitations affecting interference does not run until the last act of interference with the contract.

Schessler v. Keck, 125 C.A. 2d 827.

While the state action for breach of contract and damages was being maintained and under appeal, petitioner was unable to ascertain whether respondent Jackson Appliance Co., Inc. had been successful in interfering with the land purchase contract or to what extent petitioner had been damaged by Jackson's conduct which was still continuing during the appeal. Therefore, Petitioner contends that such action tolled the statute of limitations and brought petitioner within all statutes of limitations involved.

Dillon v. Board of Pension Commissioners, 18 C. 2d 458;
Marden v. Bailard, 124 C.A. 2d 458.

There is a conflict between the circuit court's decision and the court's holding in *Donovan v. Dallas*, 377 U.S. 408.

The questions are of great importance to the orderly administration of the judiciary. The power of the court to adopt affirmative and personal defenses for a defendant should be retained and the action of the court in dismissing an action against a defendant who has not requested such relief should also be corrected by reversal.

This case raises fundamental and important points of Federal-State law and procedure which this court should pass upon.

CONCLUSION

Certiorari should be granted to give good faith to and protect both the federal laws and the laws of California as they are interpreted by the California decisions and this court and to properly set aside the excessive jurisdiction assumed by the Federal District Court and sanctioned by the Court of Appeals of the 9th Circuit. Summary judgment is a drastic remedy and should not be used where there is an issue of fact to be decided.

Pacific American Fisheries, Inc. v. Mullaney (CA 9) 191 F. (2) 137.

Rule 56 regarding summary judgment collides with the Seventh Amendment U.S. Constitution requiring review of facts by a jury in a federal court. The right to have a federal court decide the issues of fact in a regular trial has been given by Congress. The decisions below conflict with that right.

Donovan v. Dallas, 377 U.S. 408; 12 L. Ed (2) 409;
McKim v. Vorbies, 7 Circuit 279 3 L. Ed 342;
Diggs v. Walcott, 4 Circuit 179 2 L. Ed 587;
Princess Lida v. Thompson, 305 U.S. 456, 465-468 83 L Ed 285, 290-292.

This court should grant certiorari and so decide.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX "A"

MEMORANDUM OF OPINION RE DENIAL OF MOTION FOR SUMMARY JUDGMENT DATED JULY 27, 1960

In the Superior Court of the State of California in and for the County of Ventura—No. 46131

Boys Town U.S.A., Inc., a Nevada Corporation, Sunset Development Company, a Nevada Corporation,

Plaintiffs,

vs.

The World Church, a California Corporation,

Defendants.

MEMORANDUM OF OPINION

This is the motion of the defendant, The World Church, a California corporation, for a summary judgment against the plaintiffs.

A motion for a summary judgment cannot be granted where there is any triable issue of fact. If the affidavits and other evidence introduced in support of or in opposition to the motion show that there is a conflict in the evidence to be presented by the parties on a material issue, the trial court may not resolve that

conflict in the evidence on the hearing of the motion for a summary judgment, but must deny the motion. The case may then proceed to a trial on the merits, at which time the Court is of course authorized and required to resolve the conflicts in evidence presented by the several parties. Although I have permitted testimony to be taken on this case in support of and in opposition to the motion, I am not permitted to resolve any conflicts in the evidence and determine what the facts are, but am only authorized to determine whether there is a conflict in the evidence on a material issue in the case.

After considering all the affidavits and evidence in support of and in opposition to the motion, I am of the opinion that several triable issues of fact exist. Without determining whether there may be others, I am satisfied that the following triable issues of fact are presented:

(1) At the time the defendant stated to plaintiffs that defendant annulled, cancelled, or rescinded the agreement, were the plaintiffs in substantial default under the requirements of the agreement?

(2) Did the defendant breach the agreement by refusing to deliver its deed on the plaintiffs' demand or by repudiating the agreement at a time when the plaintiffs had performed all of the requirements of the agreement entitling them to the delivery of the deed?

(3) Did the defendant prevent performance on the part of the plaintiffs by threatening to annul, cancel, or terminate the agreement unless the plaintiffs met conditions, including the payment of money, which were in excess of the requirements of the agreement?

(4) Did the plaintiffs consent to the defendant's cancellation or rescission of the agreement, so that there was a mutual rescission thereof?

I shall not attempt to analyze the affidavits or the evidence or the basic documents involved in detail. Rather, I shall merely comment on some of the main contentions advanced by the parties.

It is the contention of the church that it was not required under the agreement to deliver the deed until the plaintiffs had made the first installment payment of $350,000 on the purchase price. There is evidence which, if believed, would justfy the inference that Dr. Jaggers, as representative of the church, demanded such payment as a condition to the closing of the escrow prior to the specified deadline of July 24, 1959. I can find nothing in the agreement or the escrow instructions to justify this contention. The contract for sale and purchase provides that "seller shall deliver simultaneously herewith the usual Grant Deed of Real Estate." As concurrent conditions to the delivery of the deed, the purchaser is required to deliver its note secured by a deed of trust on the property, and deliver into escrow the stock in Sunset Development Company

for sale and as further security for the payment of the balance due on the purchase price. The contract further provides that the first installment of the balance of the purchase price in the amount of $350,000 "will be payable . . . within 275 days after the execution of this Purchase Agreement" and that thereafter annual payments of $300,000 shall be made, with the entire balance due and payable five years from the date of the Purchase Agreement. It is thus apparent that the payment of the first installment of $350,000 was not a condition precedent or a condition concurrent to the delivery of the sellers deed.

The defendant contends that the plaintiffs were in default because they had not deposited the note and deed of trust for the balance on the purchase price in the escrow by the July 24th deadline. The witness Bruce Stevens testified on behalf of the plaintiffs that all documents required by the escrow were deposited therein prior to the July 24th deadline. However, assuming that no note and deed of trust had been deposited there remains a triable issue of fact as to whether this constituted a default. Under the Contract for Sale and Purchase of Real Property dated April 13, 1959 it is clear that the delivery of the defendant's deed was to be concurrent with the delivery of the plaintiffs' note and deed of trust. There is no evidence to indicate that the defendant tendered its deed. It appears that these remained concurrent conditions under the escrow instructions. However, the escrow

instructions contained an additional requirement that the amount of the note and the terms of the note and deed of trust were to be specified and approved by all parties. This would appear to require action on the part of the defendant to specify the amount and the terms of the documents before asserting a failure to deposit them as a breach of the agreement. There is no evidence indicating that such specification was made by the defendant. From the documents it could be inferred that the specification of the amount of the note was considered necessary by the parties because the balance due on the purchase price to be presented by the note and deed of trust was to be reduced by the amount of certain liens and judgments against the property which the plaintiffs agreed to pay "as a part of and not in addition to the consideration for executing this agreement and contract." On page two of the agreement it was provided that "the total amount payable to the seller will be five million four hundred dollars, minus the balance of said encumbrances with accrued interest and taxes, and any other obligations of the seller assumed by the purchaser unless such obligations, so assumed, are expressly added to the purchase price by the provisions hereof." If it was the intention of the parties to modify the amount of the third trust deed as specified in the original agreement by reducing it by the amount of the outstanding liens against the property, this may have been information peculiarly within the knowledge of the defendant. In

any event, since the amount and terms of the note and deed of trust were to be "specified" under the terms of the escrow it would appear it was incumbent upon the defendant to at least tender a proposed note and deed of trust before it could be said that the plaintiffs were in default in failing to execute and deposit the note and deed of trust into the escrow.

The defendant contends that the plaintiffs were in default at the time the defendant annulled and cancelled the agreement, or attempted to do so, because plaintiffs had not paid said liens against the property hereinabove referred to. It appears from the original contract that the purchasers were taking title subject to the liens, and that although they agreed to pay them, no specific time was specified in the agreement within which they were to be paid. Payment of the liens against the property is not mentioned under the terms of the escrow instructions. Where no time is specified for such payment the law would imply that it should be made within a reasonable time. There is no evidence in the affidavits or other proof from which I could conclude as a matter of law that a reasonable time for the payment of the liens against the property had expired. In this connection, there is no evidence that any proceedings to foreclose such liens had been commenced or were pending.

The defendant contends that the plaintiffs were in default on July 24, 1959 because they had not deposited the one million eight hundred thousand (1,800,-

000) shares of stock in the Sunset Development Company mentioned in the original agreement into escrow with the California Bank in Los Angeles. No such requirement is mentioned in the escrow instructions given to the National Title Company. The original agreement requires that an escrow of the stock be established, but does not specify the date on which it should be deposited in escrow, nor does it clearly specify the escrow agent. The requirement of such an escrow is mentioned on pages three and four of the agreement. On pages seven and eight of the agreement, it is provided that the purchasers "shall account to the seller every thirty days after execution of this agreement through the California Bank for all proceeds received by (purchasers) including all payments made by purchasers to said California Bank of Los Angeles, California for the account of seller," and goes on to provide for the inspection of books and records of the seller and of the California Bank. It may be that this provision of the agreement raises an ambiguity in connection with the identity of the escrow agent, but if so it will have to be resolved by parole evidence at the trial on the merits of the case. Also, plaintiffs contend that they were not required to put the stock in escrow until such time as the defendant delivered its deed. The contract does not prescribe a specific time for the deposit of the stock in escrow. As above indicated, I am of the opinion that the deposit in escrow was to be concurrent with the delivery of the deed.

The defendant church contends that the plaintiff was in default on July 24, 1959 because the plaintiff had not executed and delivered to the church its deed for mineral rights to the land which was being sold by the defendant. This contention cannot be sustained. The contract provides (page four) that the purchaser is entitled to take possession upon closing the escrow and transfer of title. The contract further provides, page eight) that the purchaser is to execute the deed of the mineral rights to the seller within thirty (30) days after the purchaser's date of possession.

Affidavits and proofs were offered by the defendant church from which the trier of fact might infer that the plaintiffs, at a conference in San Francisco, indicated their inability to perform the agreement and consented to the declaration of annullment, cancellation, and rescission by the defendant church. However, the plaintiff's affidavits and proofs effectively controvert this evidence adduced on behalf of the church, with the result that the issue remains to be determined at the trial of the case on the merits.

The defendant church also contends that neither of the plaintiffs had qualified to do intra-state business in this state pursuant to the requirements of Corporations Code Sec. 6400 and 6401, and argues that Corporation Code Sec. 6801 and 6802 therefore require that the plaintiffs' complaint be dismissed. This contention must fail for several reasons. It seems highly doubtful whether a single transaction consisting of the pur-

chase of land by a corporation organized in another state, constitutes the doing of intrastate business in this state (See *McMillan Process Co. v. Brown,* 33 Cal. App. 2d 279; *Equitable Trust Co. of New York v. Western Land and Power* Co. 38 Cal. App. 535). Also, Corporations Code Sec. 6801 and 6802 merely prohibit the foreign corporation from *maintaining* an action on the intra-state business until such time as the foreign corporation has qualified to do business in this state. This affords the other party merely a plea in abatement and under the general rules governing pleas in abatement, the defect may be cured after the plea is made and before the trial is concluded (Witkin on California procedure Vol. II, p. 1554). Such a plea in abatement is not considered to be a defense going to the merits of the action (*Reed and Co. v. Harshall* 12 Cal. App. 697). It would appear therefore that even if it could be said that the plaintiffs' transaction here involved constituted the doing of intra-state business in California, the defendant at the most would be entitled to an order abating the prosecution of the action, but that the same would not entitle the defendant to a judgment on the merits of the case, such as defendant requests on this motion for summary judgment.

It follows that the defendant's motion for a summary judgment should be and it is denied.

Dated this 27th day of July, 1960.

E. PERRY CHURCHILL
Judge of said Superior Court

APPENDIX "AA"

JUDGMENT OF TRIAL COURT DATED JULY 23, 1962

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Defendants.

Filed July 23 1962, Robert L. Hamm, County Clerk
By /s/ELEANORE M. JACOBS
Deputy County Clerk

In the Superior Court of the State of California
in and for the County of Ventura
No. 46131

Boys Town U.S.A., Inc., a Nevada corporation, Sunset Development Company, a Nevada Corporation,
Plaintiffs,

vs.

The World Church, a corporation, Jackson Appliance, Inc., Doe I, Doe II, Doe III, Doe IV and Doe V., inclusive,
Defendants.

JUDGMENT

This cause came on for hearing on July 19, 1962, before the above-entitled Court, the Honorable E. Perry Churchill, Judge presiding, on the motion of The World Church, a California corporation, and Jackson Appliance, Inc., a California corporation, defendants, to dismiss, and was presented, argued and heard on said day and on July 20, 1962, plaintiffs Boys Town U.S.A., a Nevada corporation, and Sunset Development Company, a Nevada corporation, appearing by their attorneys, Jerome Weber, Esq., and Lawrence B. Chapman, Esq., by Jerome M. Bame, Esq.; plaintiffs also appeared by Athearn, Chandler & Hoffman and Theodore P. Lambros, by Theodore P. Lambros, Esq.; defendants, The World Church and Jackson Appliance, Inc., appearing by their attorneys, Willedd Andrews, Esq., and Wiseman and Elmore, by Oscar Wiseman, Esq., and the cause having been presented, heard and argued on the Notice of Motion, Affidavits, points and authorities and depositions on file, and the complete record and minutes of the case, and being argued and considered as motions for dismissal as well as for summary judgment, the Court, being fully advised in the premises, on the basis of the said motions, the supporting documents, arguments, and the inherent power of the Court, and good cause appearing therefor,

IT IS HEREBY ORDERED that the said Motion to Dismiss be and the same is hereby granted; and that the above-entitled action and each and every cause of action of the First Amended Complaint be and the same hereby is dismissed, and that defendants The World Church, a California corporation, and Jackson Appliance, Inc., a California corporation, have judgment on the merits against plaintiffs and each of them with their costs.

Dated July 23rd, 1962

/s/ E. PERRY CHURCHILL
Judge of the Superior Court

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APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Boys Town, U.S.A., Inc., a Nevada corpotion,
Appellant,
vs.
The World Church, a California corporation; Jackson Appliance, Inc., a California corporation,
Appellees.
No. 19,556

[August 10, 1965]

Appeal from the United States District Court
For the Southern District of California
Central Division

Before: BARNES and ELY, Circuit Judges; and POWELL, District Judge

POWELL, District Judge:

This appeal is from a judgment of dismissal on the merits on a motion for summary judgment in an action for specific performance of a contract and damages for its breach. It is a diversity case. This Court has jurisdiction under 28 U.S.C. 1291.

On April 13, 1959, the World Church (Church) as seller, entered into a contract of sale of California real estate to the appellant and Sunset Development Company.[1] Performance of the contract was to be completed on July 24, 1959. On June 1, 1959, the Church, the seller, gave notice of the cancellation, termination and rescission of the contract.

On March 28, 1960, appellant commenced an action against the Church in the Superior Court of the State of California in and for the County of Ventura. The complaint in that action sought specific performance of the same alleged contract which was attached to the complaint in the lower court here. It also sought damages for breach of the contract. It asserted the seller was obligated to convey title to the property on July 24, 1959.

On March 17, 1961, Jackson Appliance, Inc. (Jackson) acquired title to the subject real property from the Church. On June 28, 1962, Jackson intervened in the state court action in Ventura County and filed its answer in intervention. It alleged ownership of the property, that it owned no amount in damages to appellant and that there was no right in appellant to specific performance of the contract.

---

[1]Sunset Development Company conveyed all its interest in the contract to the appellant prior to the commencement of this action. Reference will only be made to appellant Boys Town, U.S.A., Inc.

On July 23, 1962, the Superior Court for the State of California in Ventura County entered a judgment on the merits in that suit in favor of Jackson and the Church. That judgment found appellant was not entitled to damages from either defendant or intervener and was not entitled to specific performance of the contract.

The state court judgment was appealed to the District Court of Appeals for the State of California and on October 23, 1963, was affirmed. 221 C.A. (2d) 468; 34 Cal. Rptr. 498. Petition for hearing by the Supreme Court was denied December 18, 1963.

This action was filed in the United States District Court on February 26, 1964. It concerns the same property that was described in the prior state court action. The complaint is for damages and specific performance based on the same contract as that relied on in the former state court action. The only allegation not in the amended complaint in the state court action is that Jackson has interfered with the appellant's contract with the Church and is liable for damages.

RES JUDICATA OR ESTOPPEL BY JUDGMENT

There is an invasion of only one primary right by each of the defendants. That is the right to whatever contractual benefits appellant may be entitled under the contract of purchase. That right was adjudicated in the former action, which judgment is now a bar to this action by appellant.

Restatement, Judgments §48:

> "Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action."

See: *Panos v. Great Western Packing Co.*, 21 C. (2) 636 (1943), 134 P. (2d) 242;
McNulty v. Copp, 125 C.A. (2d) 697 (1954), 271 P. (2d) 90.

Appellant seeks to avoid the effect of this rule by contending that Jackson was not a party to the first case. Jackson was a party to the case by intervention and subject to the jurisdiction of the court. It raised the questions in its answer in intervention that terminated the case. The state court judgment provided dismissal as to Jackson.

All matters that could have been raised by any of the parties will be considered as adjudicated.

Heiser v. Woodruff, 327 U.S. 726 (1946), rehearing denied 328 U.S. 879:

"In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit." (p. 735)

Hatchitt v. U.S., 158 F. 2d 754 (9 Cir. 1946):

"Paraphrasing the language of the following authorities and applying it to the cases at bar, we may say that it is of no importance that in the St. Marie litigation the appellants failed to set up their rights — namely, those under the 1923 schedule as well as those under the one of 1927 —upon which their cause of action could have been maintained. It is sufficient that it might have been litigated." (p. 757)

McFaddin v. H. S. Crocker Co., 219 Cal. App. (2d) 585, 33 Cal. Rptr. 389, 392:

"* * * It is well settled in this state that a party may not split a single cause of action, using the same obligation as the basis of separate suits, and that where this is done the judgment in the first action may be pleaded as a bar to a subsequent suit based on the same fundamental claim which could have been presented in the first action."

STATUTE OF LIMITATIONS

The contract was to be performed by the Church on July 24, 1959. This action was commenced February 26, 1964, more than four years later. The statute of limitations that governs the actions on the contract is California Code of Civil Procedure, Section 337 (Vol. I, R.p. 88, lines 25-28). It is a four year limitation and bars action against the Church.

Appellant cites cases which purport to permit a postponement of the running of the statute. They are *Ross v. Tabor,* 53 Cal. App. 605, 200 P. 971 (1921); *Union Sugar Co. v. Hollister Estate Co.,* 3 Cal. (2d) 740, 47 P. (2d) 273 (1935), and *Tahoe Pines Co. v. Newman,* 59 Cal. App. 186, 210 P. 445 (1922). They do not assist appellant here.

Ross v. Tabor holds that since the contract involved was an executory one, the statute of limitations did not commence running until the time arrived for complete performance, unless there had been a mutual abandonment or rescission by plaintiff.

The *Union Sugar* case holds that in an executory farming contract, "where the parties did not mutually abandon or rescind it upon a breach or successive breaches, the injured party could wait until the time arrived for a complete performance by the other party and then bring an action for damages for such breaches." (Page 276)

The *Tahoe Pines Co.* case holds that in an action for specific performance of an installment contract for the purchase of realty, the cause of action accrues when the last installment becomes due. This is based on the equitable doctrine of mutuality. Neither party to such an installment contract can maintain an action for specific performance until the final payment is due since the "vendor is prevented because of the fact that the installments are not due, and the vendee for the reason that until he has made full payment he is not in a condition to demand a conveyance." (Page 447)

The principal is stated in Restatement, Contracts, as follows:

> "§322. WHEN STATUTE OF LIMITATIONS BEGINS TO RUN IN CASE OF ANTICIPATORY BREACH.
>
> If no action on an anticipatory breach is brought before the time fixed by the contract for the beginning of performance by the party who has committed such a breach, the period of the Statute of Limitations begins to run only from the time so fixed by the contract."

The appellant states the statute of limitations is a personal defense and was not raised by the Church and Jackson cannot raise it for the Church. We disagree as the correct statement of the law appears to be stated in *Taylor Bros. Co. v. Duden,* 188 P. 2d 995, 996 (Utah 1948), where the court quoted 34 Am. Jur., Limitations of Actions, §379, page 294:

"Although it is generally true that the statute of limitations is a plea personal to the debtor, it is nevertheless established that where there is a privity between the party who could, if sued, plead the statute and the party offering to plead it, the latter may plead it to save his property. Such is the case with heirs, mortgagees, transferees of mortgaged property, and, unless the grant is fraudulent, vendee. * * * "

See also:

Johnson v. Ware, 58 Cal. App. 2d 204, 136 P. 2d 101 (1943);

Tinsley v. Lombard, 46 Ore. 9, 78 P. 895 (1904);

George v. Butler, 26 Wash. 456, 67 P. 263 (1901);

Developments — Statute of Limitations, 63 Harv. L. Rev. 1177, 1250 (1950).

Appellant says this action is one for slander of title by Jackson and is therefore not barred by the two year statute of limitations, Cal. Code of Civil Procedure, Sec. 339. The claim of slander of title is made for the first time on appeal. The complaint alleged a claim for damages against Jackson for interference with contract. Such a claim is barred by the two year statute, Sec. 339. *McFaddin v. H. S. Crocker Co.,* 219 Cal. App. (2d) 585, 33 Cal. Rptr. 389, 393 (1963)

"By the third cause of action the plaintiff sought to recover damages for tortious interference with her business. (Citations) With respect to the allegation as to a conspiracy, the following statement in *Agnew v. Parks,* 172 Cal. App. 2d 756, at page 765, 343 P. 2d 118, 123, is apropos: 'There existing no cause of action for conspiracy in and of itself, the statute of limitations is determined by the nature of the action in which the conspiracy is alleged.' Since the applicable statute of limitations is embodied in section 339, subdivision 1, of the Code of Civil Procedure, the cause of action is barred because the action was not commenced within two years of the commission of the wrong. (Citations omitted.)"

The appellant may not change his theory for the first time on appeal, which appellant has endeavored to do to avoid the applicable statute of limitations.

"* * * Neither of these contentions were presented to the trial court. It was assumed in the trial court that the statute of limitations was properly pleaded, and that section 338, subd. 1, of the California Code of Civil Procedure was the applicable statute. In any event, therefore, appellee cannot here claim waiver, having treated appellant's plea of the statute as sufficient upon the trial. * * * Moreover, the case should not here be disposed of upon an entirely different theory. * * *" *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 F. 2d 742, 751 (9th Cir. 1936), *cert. denied* 299 U.S. 613 (1937).

From the record here it appears that if permitted appellant could not set out a valid claim for relief on the theory of slander of title. The contract between appellant and the Church has been adjudged invalid. The claim of slander of title requires a showing of falsity —that is lacking here. The validity of Jackson's rights were adjudicated in the state court.

The law in California on this subject is stated in *Kirsch v. Barnes,* 153 F. Supp. 260, (N.D. Cal. 1957), affirmed 263 F. 2d 692 (9th Cir 1959).

> "In adopting the Restatement rule, the California Supreme Court in *Gudger v. Manton,* 21 Cal. 2d 537, 134 P. 2d 217, set forth the following definition of slander to title:
>
> 'One who, without a privilege to do so, publishes matter *which is untrue* and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused. * * * Dean Prosser sets forth five basic elements of the tort as the requirements that:
>
> 1. The *falsehood* must be communicated to a third person;
>
> 2. The publication and its disparaging innuendo must be plead and proven;

3. The *falsity of the matter* must be plead as part of the plaintiff's cause of action;

4. The publication must have played a material and substantial part in inducing others not to deal with plaintiff; and

5. The plaintiff must have suffered special damage as a result.

See Prosser on Torts, 2d Ed., 1955, p. 764 et seq. Aside from the question of privilege * * *, the gravamen of the action is the disparaging 'innuendo' or 'imputation' of *matter that is without legal foundation and hence, false* (Citations omitted)." (Emphasis supplied.) (p. 263-264.)

The judgment of the District Court is affirmed.

Appellee Jackson asks for damages under 28 U.S.C.A. 1912, which authorizes their allowance for delay. We do not consider this case as one calling for a penalty of damages against the appellant and grant no relief under that section.

APPENDIX "C"

OPINION OF DISTRICT COURT OF APPEALS

Willedd Andrews, Walker, Wright, Tyler & Ward and Oliver S. Northcote for Defendants and Respondents.

FOURT, J.—This is an appeal by plaintiffs [i.e. purchasers] from a judgment of dismissal in an action wherein plaintiffs sought specific performance of and damages with reference to a sales agreement for the purchase of real property.

The pertinent facts will be set forth under the various contentions. [1] The first issue is whether the contract for the sale and purchase of the subject real property is specifically enforceable. The trial court indicated in its statements from the bench that, among others, one of the grounds for sustaining defendant's motion to dismiss was that the contract in question lacked mutuality of remedy. The contract provides in pertinent part as follows:

"The Seller [i.e. defendants] shall receive Forty per cent (40%) of all net proceeds from the sale of all stock placed in escrow, but the distribution of these net proceeds will not begin until Sixty (60) days from the date of this Contract or Purchase Agreement. The

Seller will allow Purchaser [i.e. plaintiffs] to distribute One Hundred per cent (100%) of the net proceeds within the first Sixty (60) days, as the Purchaser sees fit, but the Purchaser shall be responsible to deliver Forty per cent (40%) of all net proceeds to the Seller as accumulated within the first Sixty (60) days as hereinabove stated and on the terms as hereinafter described until all of the obligations to the Seller and the mortgagees and beneficiaries of the Trust Deeds are retired, unless M. S. CLARK ENTERPRISES, INC., an Ohio corporation, and Fenton Sitton, also known as F. A. SITTON & COMPANY, have been paid in full; in which event, all of the proceeds from the sale of the stock shall be paid to Seller, except Ten per cent (10%) which is to be paid to Ranch Engineering Co., a California corporation.

"If, however, the Forty per cent (40%) is not sufficient to make the payment of Three Hundred Thousand Dollars ($300,000.00) per year to Seller, the Purchaser shall pay the difference between the Forty per cent (40%), and the said sum of Three Hundred Thousand Dollars ($300,000.00) per year.

"The terms of the Agreement and the payments thereon shall not depend upon, or be subject to any sale of stock by either BOYS TOWN, U.S.A., INC., a Nevada corporation, or SUNSET DEVELOPMENT COMPANY, a Nevada corporation.

"To secure performance of this Purchase Agreement and its terms for payment, the shareholders, a list of which is attached hereto and made a part hereof, will place One Million Eight Hundred Thousand (1,800,000) Shares of the SUNSET DEVELOPMENT COMPANY, a Nevada corporation, in escrow, and will authorize the sale of these shares to guarantee the terms of this Purchase Agreement and to fulfill the requirements of the escrow effectuating this Purchase Agreement. In the independent escrow mentioned, one of the terms will be the payment to M. S. CLARK ENTERPRISES, INC., an Ohio corporation, according to the Assumption and Purchase Agreement executed by and between BOYS TOWN, U.S.A., a Nevada corporation, and M. S. CLARK ENTERPRISES, Inc., an Ohio corporation, marked Exhibit B, attached hereto and made a part of this AGREEMENT by reference; and according to the Assumption Agreement by and between BOYS TOWN, U.S.A. INC., a Nevada corporation, and Fenton Sitton, also known as F. A. SITTON COMPANY, hereto attached and marked Exhibit C, and made a part of this AGREEMENT by reference.

"It is the understanding running with this AGREEMENT that the payments due to THE WORLD CHURCH, a non-profit corporation, will be made by the Purchaser, as follows:

"Forty per cent (40%) of the net proceeds derived from the sale of the above-mentioned stock will be paid to THE WORLD CHURCH, a non-profit Cali-

fornia corporation, until the payments due THE WORLD CHURCH, a non-profit California corporation, are paid in full.

"Forty per cent (40%) of the net proceeds derived from the sale of the above-mentioned stock will be allocated to M. S. CLARK ENTERPRISES, INC., an Ohio corporation.

"Ten per cent (10%) of the net proceeds derived from the sale of said above-mentioned stock will be paid to Fenton Sitton, also known as F. A. SITTON & COMPANY.

Ten per cent (10%) of the net proceeds derived from the sale of the said above-mentioned stock shall be retained by Ranch Engineering Co., a California corporation.

"This schedule of payments shall continue until THE WORLD CHURCH, a non-profit California corporation, is paid in full."

The trial judge further stated:

"Entirely aside from the question of illegality, the provisions in the agreement for the deposit of stock by the stockholders—who were supposed to be named, but weren't — is an integral part of this agreement, and it is security for the purchase price, something that the purchaser [sic] was entitled to have here. I think it comes within these cases where the Court simply wouldn't supervise it, and furthermore, couldn't. On one aspect of the agreement, the stockholders were the

ones that were supposed to put it up, and what if they didn't? How could the World Church insist upon it and how could the Court insist upon it? They weren't even parties to the agreement: there would be no way of compelling them under that to put up the stock. And yet, certainly, this was an integral part of the agreement from the standpoint of at least security, if not the sole method of payment. Because while the agreement says that this agreement shall not be dependent upon sales of stock by Boys Town or Sunset Development Company, it doesn't say it isn't dependent upon sales of stock by these purchasers, by these stockholders.

"This may involve a construction of the contract, as to what was meant there, but I can't see how, under any possibility, the Court would say that the plaintiffs could have specific performance of a contract when it involved all of these details which had to be performed either by a third party, not even a party to the contract, or by Sunset Development Company itself. Under the facts shown by the affidavits and all of those declarations and under a situation where a further permit, at least, would have to be obtained from the Commissioner of Corporations, that in itself would come within the type of thing, under the cases cited by Mr. Wiseman, that the Court would not supervise, and therefore there is this lack of mutuality." Appellants criticize the doctrine of mutuality of remedy, however the requirement of mutuality of remedy has been given statutory

recognition in this state (Civ. Code, §3386) since 1872. [2] What is stated in *Sesma v. Ellis,* 38 Cal. App. 2d 139, at pages 143-144 [100 P. 2d 816], is pertinent to the case at bar: "A further consideration is that there was no mutuality of remedy with respect to the claimed contract, in the absence of which a contract may not be specifically enforced. The contract, as contended for, called for the doing of things by third parties which they could not be required to do, and it clearly appears that specific performance on the part of the appellants could not have been enforced by the respondents had such relief been sought. Under such circumstances, the court was justified in refusing the relief asked for by the appellants."

[3a] The next issue is whether the trial court abused its discretion when it dismissed the within action because of plaintiffs' failure diligently to prosecute under the Code of Civil Procedure, section 583.[1]

[4] The discretion to dismiss is that of the trial court and it will be disturbed only in the case of manifest abuse (*Abner Corporation, Inc. v. Lushing,* 212 Cal. App. 2d 597 [28 Cal. Rptr. 207].)

[3b] The trial judge said from the bench: "I am also of the opinion, in view of the whole file, that there has been an unreasonable delay in prosecuting this

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[1]Code of Civil Procedure, section 583, provides in pertinent part as follows: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. . . ."

action. Under all the circumstances, I think the defendants' motion to dismiss the action should be, and it is, granted."

An examination of the whole record negatives any conclusion that there was any abuse of discretion upon the part of the trial court. In defendants' declaration in support of the motion to dismiss the complaint it is asserted in substance that the within action has been pending since March 28, 1960; that it was reset for pretrial for July 19, 1962, and for trial October 8, 1962; that the time to trial from the filing date would be over two and one-half years; that it has been set and reset for pre-trial as follows: In 1960, October 3 and 23; in 1961, May 8, June 9, July 12, July 28 and September 21; and in 1962, March 21, June 28, July 19; that practically all of the settings were initiated by the defendants and not the plaintiffs and no motion to set had been made by the plaintiffs since June of 1961.

Under the circumstances no useful purpose would be served in discussing appellants' further point that the trial court erred in not permitting appellants to amend their complaint to assert a cause of action for damages.

The judgment is affirmed.

Wood, P. J., and Lillie, J., concurred.

A petition for rehearing was denied November 19, 1963, and appellants' petition for a hearing by the Supreme Court was denied December 18, 1963.

APPENDIX "D"

CONTRACT FOR SALE AND PURCHASE OF REAL PROPERTY DATED APRIL 13, 1959

Between the World Church as Seller

and

Boys Town USA, Inc. and Sunset Development Company as Purchaser

This Agreement made and entered into this 13th day of April, 1959, by and between The World Church, a non-profit California corporation, hereinafter called "Seller," and Boys Town, U.S.A., Inc. a Nevada Corporation, hereinafter called the "Purchaser," and Sunset Development Company, also called the "Purchaser."

WITNESSETH:

Whereas, the parties hereto are in the process of opening an escrow with the National Title Division of the Title Insurance and Trust Company, 3540 Wilshire Boulevard, Los Angeles, California, Escrow No. 516143, for the sale of certain real property commonly known as "The World City," formerly known as Rancho dos Vientos, in the County of Ventura, State of California, and as more particularly described in or as part of said above-numbered escrow instructions.

That the seller agrees to sell and the purchaser agrees to purchase the following described real property, with the appurtenances, situated in the County of

Ventura, State of California, the legal description of which is attached hereto and made a part thereof; hereinafter referred to as the "Ranch."

The purchase price is Five Million Four Hundred Thousand Dollars ($5,400,000.00), which purchaser agrees to pay on the following conditions:

Seller shall deliver simultaneously herewith the usual Grant Deed of Real Estate conveying a marketable title, subject to three (3) existing Deeds of Trust and Bill of Sale to personal property, copies of which are hereto attached and marked Exhibits A, and subject to certain liens against the property, and a note secured by a Third Deed of Trust on the property herein referred to in the sum of Two Million Six Hundred Thousand Dollars ($2,600,000.00), with interest of five per cent (5%) per annum, said note and Third Deed of Trust to be executed by Boys Town U.S.A., Inc., a Nevada corporation, and Sunset Development Company, a Nevada corporation.

(1) A trust Deed held by M. S. Clark Enterprises, Inc., an Ohio corporation, for approximately Two Million Eighty-six Thousand Dollars ($2,086,000.00).

(2) A Trust Deed to Title Insurance and Trust Company which was subsequently assigned to F. A. Sitton and others, with a present principal balance of approximately One Hundred Thousand Dollars ($100,000.00).

(3) A Trust Deed held by Fenton Sitton, also known as F. A. Sitton & Company, for approximately Three Hundred Seventy-five Thousand Dollars ($375,000.00).

The items (2) and (3), hereinabove, will be considered as a Unit, and referred to hereafter as the Sitton Deeds of Trust.

(4) A note secured by a Third Deed of Trust on the property herein referred to in the sum of Two Million Six Hundred Thousand Dollars ($2,600,000.00) with interest at five per cent (5%) per annum, said note and Third Deed of Trust to be executed by Boys Town, U.S.A., Inc. a Nevada corporation, and Sunset Development Company, a Neveda corporation, in favor of the World Church, a non-profit Corporation.

The terms of the Trust Deed held by M. S. Clark Enterprises, Inc., an Ohio corporation, and the Sitton deeds of Trust as modified by written Assumption Agreements entered into between M. S. Clark Enterprises, Inc., an Ohio corporation, and Purchaser, and Fenton Sitton, also known as F. A. Sitton & Company, and Purchaser, simultaneously, with the execution of this Contract or Agreement, and are hereby expressly incorporated by reference into this Purchase Agreement, and the seller and the purchaser hereby agree to be bound by all the terms of said Trust Deeds, insofar as they relate to this Purchase Agreement. It is further noted that rents, taxes, insurance, interest and other ordinarily prorated items relating to the

three (3) aforementioned Trust Deeds are to be prorated as of the date of purchaser taking possession under this Purchase Agreement.

Payment of the purchase money is to be made, less the amount owing on said existing Trust Deeds and obligations, which purchaser has assumed in writing, has received copies of, and with which purchaser is familiar, including the note and Third Trust Deed owned by the World Church Corporation.

The total amount payable to the Seller will be Five Million Four Hundred Thousand Dollars ($5,400,000.-00), minus the balances of said encumbrances with accrued interest and taxes, and any other obligations of seller assumed by purchaser unless such obligations, so assumed, are expressedly added to the purchase price by the provisions hereof, and will be payable as follows: Within Two Hundred and Seventy-five (275) days after execution of this Purchase Agreement, the purchaser will pay seller Three Hundred and Fifty Thousand Dollars ($350,000.00), and thereafter minimum yearly payments of Three Hundred Thousand Dollars ($300,000.00) — inclusive of interest, which shall be at the rate of Five per cent (5%) interest per year from date of possession; the first Three Hundred Thousand Dollars ($300,000.00) payment due on the anniversary of the date of the payment which is due on or before Two Hundred and Seventy-five days (275) from the date of this Purchase Agreement, with

the entire balance being retired and wholly satisfied five (5) years from the date of this Purchase Agreement.

The Seller shall receive Forty per cent (40%) of all net proceeds from the sale of all stock placed in escrow, but the distribution of these net proceeds will not begin until Sixty (60) days from the date of this Contract of Purchase Agreement. The Seller will allow Purchaser to distribute One Hundred per cent (100%) of the net proceeds within the first Sixty (60) days, as the Purchaser sees fit, but the Purchaser shall be responsible to deliver Forty per cent (40%) of all net proceeds to the Seller as accumulated within the first Sixty (60) days as hereinabove stated and on the terms as hereinafter described until all of the obligations to the Seller and the mortgagees and beneficiaries of the Trust Deeds are retired, unless M. S. Clark Enterprises, Inc., an Ohio corporation, and Fenton Sitton, also known as F. A. Sitton & Company, have been paid in full; in which event, all of the proceeds from the sale of the Stock shall be paid to Seller, except Ten Per Cent (10%), which is to be paid to Ranch Engineering Co., a California corporation.

If, however, the Forty Per Cent (40%) is not sufficient to make the payment of Three Hundred Thousand Dollars ($300,000.00) per year to Seller, the Purchaser shall pay the difference between Forty Per Cent (40%), and the said sum of Three Hundred Thousand Dollars ($300,000.00) per year.

The terms of the Agreement and the payments thereon shall not depend upon, or be subject to any sale of stock by either Boys Town, U.S.A. Inc., a Nevada corporation, or Sunset Development Company, a Nevada corporation.

To secure performance of this Purchase Agreement and its terms for payment, the shareholders, a list of which is attached hereto and made a part hereof, will place One Million Eight Hundred Thousand (1,800,000) shares of the Sunset Development Company, a Nevada corporation, in escrow, and will authorize the sale of these shares to guarantee the terms of this Purchase Agreement and to fulfill the requirements of the escrow effectuating this Purchase Agreement. In the independent escrow mentioned, one of the terms will be the payment to M. S. Clark Enterprises, Inc., an Ohio corporation, according to the Assumption and Purchase Agreement executed by and between Boys Town, U.S.A. Inc., a Nevada corporation, and M. S. Clark Enterprises, an Ohio corporation, marked Exhibit B, attached hereto and made a part of this Agreement by reference; and according to the ssumption Agreement by and between Boys Town, U.S.A. Inc., a Nevada corporation, and Fenton Sitton, also known as F. A. Sitton Company, hereto attached and marked Exhibit C, and made a part of this Agreement by reference.

It is the understanding running with this Agreement that the payments due to The World Church, a nonprofit corporation, will be made by the Purchaser, as follows:

Forty per cent (40%) of the net proceeds derived from the sale of the above-mentioned stock will be paid to The World Church, a non-profit California corporation, until the payments due The World Church, a non-profit California corporation, are paid in full.

Forty per cent (40%) of the net proceeds derived from the sale of said above-mentioned stock will be allocated to M. S. Clark Enterprises, Inc., an Ohio corporation.

Ten per cent (10%) of the net proceeds derived from the sale of said above-mentioned stock will be paid to Fenton Sitton, also known as F. A. Sitton & Company.

Ten per cent (10%) of the net proceeds derived from the sale of the said above mentioned stock shall be retained by Ranch Engineering Co., a California corporation.

This schedule of payments shall continue until The World Church, a non-profit California corporation, is paid in full.

The Purchaser is entitled to take possession of said premises at the close of Escrow No. 516143 held by National Title Division of the Title Insurance and Trust Company, a California corporation, and transfer of title.

The Purchaser, after the date of possession, assumes all hazards of damages, damage to, or destruction of any improvements now on said land or hereafter to be placed thereon, and of the taking of said premises or any part thereof for public use.

The Purchaser agrees, until full payment of said purchase price, to keep all buildings on said described premises insured by fire insurance, or any other insurance required by law, or any other loss insurable to the full insurable value thereof against loss, or damage by fire, or by earthquake, or storm in an insurance company qualified to do business in the State of California, for the Seller's benefit as its interest may appear, and to pay all premiums therefor.

Should Purchaser default in making any payment, or in fulfilling any obligation hereunder, Seller may, at its election, enforce a forfeiture of the interest of Purchaser by commencing legal proceedings in the manner provided by law under the terms of its note and Trust Deed delivered by Purchaser to Seller, and shall forfeit to Seller as liquidated damages any and all payments made hereunder, together with any and all improvements placed on or in said property; and, such election of forfeiture by Seller shall reinstate the primary obligations by Seller to M. S. Clark Enterprises, Inc., an Ohio corporation, and Fenton Sitton, also known as F. A. Sitton & Company, on their Trust Deeds of record in Ventura County, State of Cali-

fornia, and Seller shall hold Purchaser harmless from any obligations concerning the described property created before the date of this Agreement and still existing at the time of forfeiture.

Boys Town, U.S.A. Inc., a Nevada corporation and Sunset Development Company, a Nevada corporation, will execute and deliver to The World Church, a non-profit California corporation, a Grant Deed or a Quit-claim Deed, transferring all of its right, title or interest in and to "The World City," formerly known as Rancho dos Vientos; the legal description of which is attached hereto and made a part hereof, and said Deed shall vest title in The World Church, a non-profit California corporation, to the property therein described, except the First Trust Deed of M. S. Clark Enterprises, Inc., an Ohio corporation, and the Sitton Trust Deeds, if, as and when foreclosure proceedings are commenced.

Notice of forfeiture containing the specific grounds for the proposed forfeiture shall be given by deposit in the United States Post Office of such notice, contained in a sealed envelope with postage prepaid, addressed to the Purchaser at the address given below its signature, or such other post office address, in the United States, as it may later designate by a written notice to Seller; and it is further Agreed that Purchaser shall have Sixty (60) days from the date of receipt of said notice to correct the defects or breaches contained in the notice from Seller.

There shall be no further or any other Trust Deeds, or any other contracts, assignments, assignments, or deeds of record to the real property hereinabove referred to except the First Trust Deed of M. S. Clark Enterprises, Inc., an Ohio corporation, and the Sitton Trust Deeds, and The World Church, a non-profit California corporation, until the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) has been paid in full to Seller.

It is further understood and agreed that Purchaser shall not after the execution of this Contract or Agreement execute any leases of this Contract or Agreement execute any leases of any kind whatsoever in reference to the "Ranch" without the written consent of Seller, until the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) is paid by Purchaser to Seller.

It is further understood and agreed that Purchaser shall not assign, transfer, or sell this Contract or Agreement without the written consent of Seller, until the sum of Three Hundred Fifty Thousand Dollars ($350,-000.00) has been paid to Seller.

This Agreement shall not inure to the benefit of any successor of Purchaser, unless The World Church, a non-profit California corporation, shall, prior to any conveyance of the real property, or any part thereof, covered by said Third Trust Deed to such successor, have approved in writing such successor as assignee of the benefits of this Agreement, and unless and until

such successor shall have expressly agreed at the time of said assignment to be bound by all of the provisions of this Agreement, and by all documents and agreements referred to herein by which the Purchaser is bound, and shall have delivered to The World Church, a non-profit California corporation, an appropriate instrument to such effect together with proof of authority to execute the same.

Purchaser contemplates the conveyance of said property to Sunset Development Company, a Nevada corporation, and The World Church, a non-profit California corporation, approves such assignment subject to receipt of said instruments of assumption and author (including representations as set forth in paragraph 1 hereof) which must be delivered prior to the effectiveness of said assignment. ny assignment shall not operate to relase Purchaser, and Sunset Development Company, a Nevada corporation, or any subsequent assignee from its obligations under this agreement or any other documents and agreements between the parties referred to herein.

In the event of such assignment to Sunset Development Company, a Nevada corporation, or which is approved by The World Church, a non-profit California corporation, the assignee shall be entitled to the benefit of this agreement, and all references to Purchaser herein shall be deemed to refer to such assignee (as well as to the original Purchaser in cases where an obligation of such Purchaser is involved). In the event that Pur-

chaser shall voluntary or involuntarily convey, transfer or assign the real property or any part thereof covered by said Third Trust Deed to any other person without the prior written approval of The World Church, a non-profit California corporation, an immediate default shall exist in the terms of this assignment.

It is further understood and agreed that the sale of "The World City" property, formerly known as Rancho Dos Vientos, the legal description of which is attached hereto and made a part hereof, is made by The World Church, a non-profit California corporation, subject to a Fifty per cent (50%) or one-half (½) land owners' royalty, including a Fifty per cent (50%) or one-half (½) land owner's royalty in all other minerals, regardless of name or description.

It is further understood and agreed that as a part of and in addition to the consideration for executing this Agreement or contract, that Boys Town, Inc., a Nevada corporation, will advance and pay for The World Church, a non-profit California corporation, all liens, judgments, or any other encumbrance now existing on said "The World City," formerly known as Rancho Dos Vientos, a legal description of which is hereto attached and made a part hereof, including the payments due M. S. Clark Enterprises, Inc., an Ohio corporation, and Fenton Sitton, also known as F. A. Sitton & Company.

No funds shall be used by Boys Town, U.S.A. Inc., a Nevada corporation, from the sale of stock except

to M. S. Clark Enterprises, Inc., an Ohio corporation, and Fenton Sitton, also known as F. A. Sitton & Company, and The World Church, a non-profit California corporation, according to the schedule herein set forth in this agreement.

Net proceeds herein referred to in this contract shall be designated or defined as follows: Twenty per cent (20%) as Stock Broker and Stock Salesman commission, shall be considered as net proceeds and no other expense or cost whatever may be deducted, even salaries or bonuses.

Purchaser and Sunset Development Company shall account to Seller every thirty days (30) after execution of this Agreement through the California Bank for all proceeds received by Boys Town, U.S.A., Inc. a Nevada corporation, and Sunset Development Company, a Nevada corporation, including all payments made by Purchaser and Sunset Development Company, a Nevada corporation, to said California Bank of Los Angeles, California, for the occounty of Seller, and Boys Town, U.S.A., a Nevada corporation, shall furnish monthly to Seller a Certified Public Accountant's statement for said proceeds received by Boys Town, U.S.A. to Seller and Sunset Development Company, a Nevada corporation, shall furnish a Certified Public Accountant's statement to Seller, and Seller shall have the right on the first of each and every month from and after the execution of this Agreement to have its certified public accountant examine the books, not only of

the California Bank in reference thereto, but the books, accounts and proceeds received by Boys Town, U.S.A., Inc. a Nevada corporation, and the books of the Sunset Development Company, a Nevada corporation. Seller is selling the property herein involved on an installment sales basis.

Purchaser will not accelerate payment due hereunder to such an extent as will jeojardize Seller's installment basis, without Seller's prior consent in writing; Provided, however, that Purchaser may at any time pay the entire balance of said purchase price.

In the event of a default by Purchaser and Sunset Development Company , a Nevada corporation, the said Purchaser and Sunset Development Company, a Nevada corporation, shall be liable to Seller for all damages which have accumulated, or ccrued prior to and after said default has occurred, and this damage shall be paid by Purchaser and Sunset Development Company, a Nevada corporation.

Purchaser shall record at the Ventura County Recorder's office within thirty (30) days after the Purchaser's date o fpossession a Grant Deed describing the entire property dealt with in this Purchase Agreement, specifying the Seller's right to receive the oil and mineral rights hereinabove set forth; and the Grant Deed shall contain a provision wherein it is the evidenced intention of the Grantor (Purchaser) to bind all of its assigns, heirs, and transferees, of every type.

This Contract or Agreement is one of several contracts made simultaneously herewith by and between M. S. Clark Enterprises, Inc., an Ohio corporation, the Seller, the Purchaser, and Fenton Sitton, also known as F. A. Sitton & Company, and Associates.

Title under all of said contracts is to close simultaneously; and, if for any reason any of said contracts shall fail of consummation, the Seller or Purchaser may cancel, annul and set aside this Contract; and neither party shall have any claim against the other thereon, and both the Seller and Purchaser shall be immediately returned to their original positions without further obligation to one another under this or any other Agreement.

M. S. Clark Enterprises, Inc., an Ohio corporation, shall credit the sum of Fifty-Six Thousand Four Hundred Seventy-Nine Dollars ($56,479.00) from the total obligation of the First Trust Deed held by M. S. Clark Enterprises, an Ohio corporation, against Seller.

It is further understood and agreed that this Contract is executed, subject to the Contract between Seller and American National Growers, Inc., which was executed on June 16, 1958, attached hereto marked Exhibit "C," and made a part of this agreement. Seller substitutes Purchaser to its position in said Agreement.

This Agreement is to be collateral and supplementary to said escrow instructions; and, when exe-

cuted, is to be made a part of said escrow instructions.

It Is Agreed as Follows:

(1) The property being sold hereunder and under said escrow instructions is being sold ony on an "as it" basis. Purchaser has inspected all thereof and hereby relieves Seller of all claim and responsibility not only as to the condition of the buildings, improvements, equipment and orchards; but, also, as to the amount of land or water production actually being conveyed hereby.

(2) All of the terms and conditions of said escrow instructions are hereby incorporated by reference in this Agreement as if set forth in full. In case of conflict between said escrow instructions and this Agreement, this Agreement shall supersede and control.

(3) Until such time as Purchaser has paid One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) on the purchase price of said property, as more appropriataely set forth in the escrow instructions entered into between Purchaser and Seller, Purchaser shall (a) maintain, irrigate and spray the lemo orchads Number 1 through 7, respectively, and Number 10, as well as the orchard located on said property, and do all things necessary to preserve, cultivate, and market the fruit in a good and farmerlike manner, (b) maintain all "Ranch" buildings, outhouses, appurtenances, and equipment located on said "Ranch," (c) conduct the "Ranch" operation in good and farmer-

like manner as is customarily done by all such "Ranch" operations, and in accordance with the Release Clause of the First Trust Deed held by M. S. Clark Enterprises, Inc., and Ohio corporation.

(4) In furtherance of said escrow, in the event Purchaser elects to take possession, as hereinabove set forth, all items, such as: utilities, payroll, current bills, taxes, insurance, interest on the notes and trust deeds, etc., shall be prorated as of the date of possession, and from said date, Purchaser is entitled to all income and revenue from the operation of any and all of said "Ranch" property, and is obligated to maintain and pay all expenses incidental to the operation thereof. Regardless of when Purchaser takes possession, Seller shall be entitled to keep all fruits and/or other products removed from the property prior to Purchaser taking possession, as well as any and all revolving or similar funds and credits with any and all farming associations, and Purchaser shall fully cooperate with Seller so as to enable Seller to obtain said funds as soon as practicably possible.

(5) Seller hereby agrees to execute and deliver to Purchaser simultaneously with this Agreement an assignment of the fire insurance policy now covering the buildings on said "Ranch," including the main building heretofore destroyed by fire, for the purposes of Purchaser restoring the main "Ranch" building or house to the extent that the fire insurance policy provides.

If the Purchaser should receive more than Three Hundred Thousand Dollars ($300,000.00) due to Seller annually, from Forty per cent (40%) of all net proceeds derived from the sale of stock allocated to Seller as hereinabove set forth, any surplus over and above said sum of Three Hundred Thousand Dollars ($300,000.00) annually, shall be paid to Seller, until Seller is paid in full, as referred to in the paragraph beginning at line 14 on page 3 of this Contract or Agreement.

Should there be any destruction of or loss of any of said property to be sold hereunder, Purchaser shall deliver to Seller the amount of insurance proceeds as its interest may appear or replace said property at Seller's option to the extent of the insurance policy.

Notwithstanding any of the provisions of this Agreement, or of the above referred to escrow, Seller and Purchaser expressly agree that Purchaser, or its authorized agents or representatives, shall not go onto said property or make any improvements thereon until it has satisfied Seller that Seller is adequately protected against death or injury to persons and/or damage to property by adequate insurance.

The proper posting of a notice of non-responsibility will relieve the Seller of any and all liens for work and materials furnished, as to the public liability and property damage.

The Purchaser or Purchaser's agent or independent contractor must have in effect for the term of the work,

public liability and property damage insurance in amounts of _____ and _____, respectively, and covering Seller as an insured if Seller's insurance carrier deems that necessary.

(6) Purchaser shal lat all times after the close of escrow and upon taking possession of property, keep in full force and effect Workmen's Compensation, public liability, and property damage insurance in sound companies an din amounts at least equal to those now carried by Seller. If required to protect Seller, Purchaser will show Seller as an insured under any, and/or all of said policies.

(7) Purchaser will not pay more than $1,557,000, which is 20% on or before one year from date; Provided, however, that Purchaser may at any time thereafter pay the entire balance of said purchase price.

Any and all accelerated principal payments may be made without any interest bonus or premium.

All the aforesaid payments are to be made when due and shall be released by escrow holder as Seller directs.

Should Purchaser fail to make payments to Seller according to the trems of this Agreement, and be in default thereof, and Purchaser fail to deliver possession and make the payments as required as aforesaid, and Seller deems it necessary to commence legal proceedings to compel Purchaser to do so, then Purchaser

will also pay Seller such attorney's fees as may be fixed by the court in such proceedings.

(8) Purchaser specifically agrees as a condition precedent to the execution of this Agreement by Seller that no representations of any character not contained in this Agreement and said escrow agreement have been made by Seller, or any one on Seller's behalf. Any and all claimed representations are hereby waived by Purchaser as this Agreement and said escrow instructions constitute the entire Agreement between the parties hereto.

Purchaser has delivered to The World Church, a non-profit California corporation, concurrently with the execution of this Agreement a dismissal of the Counterclaim of M. S. Clark Enterprises, Inc., an Ohio corporation (Ventura Superior Court Case No. 45606) without prejudice as to M. S. Clark Enterprises, Inc., an Ohio coproration; and Seller has delivered to M. S. Clark Enterprises, Inc., an Ohio corporation, concurrently with the execution of this Agreement, a dismissal withou prejudice of the Complaint and action of The World Church, a California non-profit corporation, against M. S. Clark and M. S. Clark Enterprises, Inc., and the Title Insurance and Trust Company, a California corporation, in the case No. 45606 (Ventura Superior Court) without prejudice as to all defendants.

All the terms and conditions of said escrow instructions are hereby incorporated by reference in this

Agreement as if set forth in full. In case of conflict between said escrow instructions and this Agreement, this Agreement shall supersede and control.

(9) This Agreement shall inure to the benefit of and be binding upon the respective successors in interest and assigns of each party hereto.

In Witness Whereof, said Corporations have caused their corporate names and seals to be affixed to the foregoing Contract of Sale and Purchase of Real Property, consisting of thirteen (13) pages, and this instrument to be executed by its Presidents and Secretaires thereunto duly authorized, on the day and year first above written.

THE WORLD CHURCH, a non-profit California corporation,
By /s/ O. L. Jaggers
President
By /s/ D. B. Jagger
Secretary
(Seller)

BOYS TOWN, U.S.A. INC.,
a NEVADA corporation
By /s/ Bruce D. Stevens
President
By _____
Secretary
(Purchaser)

State of California
County of Los Angeles—ss.

State of California
County of Los Angeles—ss.

On April 13, 1959, before me, the undersigned Notary Public, in and for the County and State, personally appeared O. L. Jaggers, known to me to be the President, and D. B. Jaggers, known to me to be the Secretary of The World Church, a corporation, that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same. Witness my hand and official seal.

/s/ Helen Wisdom

Notary Public, in and for said County and State
My commission expires: September 9, 1959

On April 13, 1959, before me, the undersigned Notary Public, in and for said County and State, personally appeared Bruce Stevens, known to me to be the President, and Robert B. Bowell, known to me to be the Secretary of Boys Town, U.S.A. Inc., a Nevada corporation, the Corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledge to me that such corporation executed the same.
Witness my hand and official seal.

/s/ Helen Wisdom
Notary Public, in and for the said County and State
My commission expires: September 13, 1959
Exhibits:

SUNSET DEVELOPMENT
COMPANY, INC.
a NEVADA corporation

By /s/ L. C. Lee
President

By _____
Secretary
(Purchaser)

State of California
County of Los Angeles—ss.

On this 13th day of April, 1959, before me, the undersigned Notary Public, in and for said County and State, personally appeared /s/ L. C. Lee, known to me to be the President, and , known to me to be the Secretary of Sunset Development Company, Inc. a Nevada corporation, the Corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledge to me that such corporation executed the same. Witness my hand and official seal.

/s/ Helen Wisdom

Notary Public, in and for the said County and State
My commission expires: September 9, 1962

Exhibits:

APPENDIX "E"

RIGHTS OF PERSONS

AMENDMENT 5

Amdt. 5. Indictment, self-incrimination, double jeopardy, due process, etc.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life- liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

F.R.C.P. 8(c)

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constitu-

ting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

LOCAL RULE 56

Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial contro-

versy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits: Further Testimony: Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

SEC. 337 C.C.P.

§ 337. Four years: written contract: exception: book account: account stated based upon account in writing: balance of mutual: open and current account in writing: resolution of written contract

Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but

the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

3. An action based upon the rescission of a contract in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Where the ground for rescission is misrepresentation under Section 359 of the Insurance Code, the time does not begin to run until the representation becomes false. (As amended Stats. 1961, c. 589, p. 1735, § 6.)

SEC. 339 C.C.P.

§ 339. Two years: oral contract: certificate: abstract or guarantee of title: title insurance policy: sheriff: coroner or constable: exception: rescission of oral contract

Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2

of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. An action based upon the rescission of a contract not in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. (As amended Stats. 1961, c. 589, p. 1736, §7.)

APPENDIX "F"

COURT'S REMARKS REGARDING JUDGMENT OF DISMISSAL DATED JULY 20, 1962

The Court's remarks in the Matter of Boys Town vs. World Church et al, No. 46131 on Friday, July 20, 1962; 2:00 P.M.

The Court: Except for a half-hour out for lunch, I have been working on this ever since we parted.

I am pretty well satisfied that Boys Town, the plaintiffs could never get specific performance of this agreement.

Entirely aside from the question of illegality, the provisions in the agreement for the deposit of stock by the stockholders—who were supposed to be named but weren't—is an integral part of this agreement, and it is security for thepurchase price, something that the purchaser was entitled to have here. I think it comes within these cases where the Court simply wouldn't supervise it, and furthermore, couldn't. On oneaspect of the agreement, the stockholders were the ones that were supposed to put it up, and what if they didn't? How could the World Church insist upon it and how could the Court insist upon it? They weren't even partise to the agreement: there would be no way of compelling them under that to put up the stock. And yet, certainly, this was an integral part of the agreement from the standpoint of at least security, if not

the sole method of payment. Because while the agreement says that this agreement shall not be dependent upon sales of stock by Boys Town or Sunset Development Company ,it doesn't say it isn't dependent upon sales of stock by these purchasers, by these stockholders.

This may involve a construction of the contract, as to what was meant there, but I can't see how, under any possibility the Court would say that the plaintiffs could have specific performance of a contract when it involved all of these details which had to be performed either by a third party, not even a party to the contract or by Sunset Development Company itself. Under the facts shown by the affidavits and all of those declarations and under a situation where a further permit, at least, would have to be obtained from the Commissioner of Corporations, that in itself would come within the type of thing under the cases cited by Mr. Wiseman, that the Court would not supervise, and therefore there is this lack of mutuality.

Now, the complaint alleges, that is, the amended complaint alleges $500,000 damages. But the complaint also alleges that the price was fair, and there are really no factual allegations to support the conclusion that the plaintiffs were damaged in the amount of $500,000. Your affidavit don't completely negative any possibility of damages. The complaint contains the conclusion that they were damaged by $500,000, it says they allege all these things, including the fact that this was a fair

and adequate consideration for the sale, and then they allege that a sa direct and proximate result of the breach of contract by the defendants, plaintiff has been damaged in the sum of $500,000. It seems to me to be a mere conclusion unsupported by the allegation of fact, in view of the allegation that the price was a fair and adequate consideration for the property.

I am also of the opinion, in view of the whole file, that there has been an unreasonable delay in prosecuting this action.

Under all the circumstances, I think that the defendant's motion to dismiss the action should be, and it is, granted.

Mr. Wiseman: Thank you, your Honor.

APPENDIX "G"

TITLE 28 U.S. CODES

SECTION 1254 (1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be review by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

IN THE

Supreme Court of the United States

October Term, 1965
No. 881.

BOYS TOWN, USA., INC.,

Petitioner,

vs.

THE WORLD CHURCH; JACKSON APPLIANCE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent Jackson Appliance, Inc. in Opposition.

Statement.

This action rests solely on diversity of citizenship; no federal subject matter jurisdiction exists or is alleged. The dispute arises from an alleged agreement whereby Respondent The World Church ("Church") was to convey real property located in Ventura County, California to Petitioner Boys Town, U.S.A., Inc. Petitioner, which is not related in any way to the famous Boys Town, initiated the controversy by filing an action in a California state court seeking specific performance or damages for breach of contract. Respondent Jackson Appliance, Inc. ("Jackson") intervened in the action as a subsequent grantee of the real

property from the Church. Judgment on the merits was entered against Petitioner on the grounds that the contract lacked mutuality of remedy. The court also noted that petitioner had failed to prosecute its action diligently. This judgment was affirmed on appeal, and the California Supreme Court declined to hear the matter. Petitioner then brought this action in the United States District Court for the Southern District of California seeking the same relief against the Church and Jackson and adding a claim against the latter for tortious interference with the contractual relations between Petitioner and the Church. On Jackson's motion, summary judgment was entered against Petitioner and in favor of both Respondents. The Ninth Circuit affirmed.

Argument.

In an attempt to continue this seemingly interminable litigation, Petitioner has attempted to frame two issues on which to base its petition for writ of certiorari:

(1) whether a subsequent grantee of real property can assert the defenses of *res judicata* and the Statute of Limitations against a prior claimant, for his own benefit as well as that of the grantor, and

(2) whether Jackson's intervention in the state court proceedings tolled California's two year Statute of Limitations (California Code of Civil Procedure § 339) for interference with contractual relations.

Respondent submits that these are utterly frivolous issues which Petitioner has used to attempt to perpetuate a cloud on the title of the subject real property.

As for the first issue, the trial court granted summary judgment on the grounds that the action against the Respondents was barred by *res judicata* and the Statute of Limitations. Petitioner claims that these two defenses could not be raised by Jackson either for its own benefit or for that of the Church. No substantial question of federal law is raised by such a claim; nor does Petitioner cite any federal decision with which the trial court's judgment is in conflict. Jackson intervened in the state court proceeding as a party defendant. Whether it can rely on the judgment in that action as *res judicata* of the claim now asserted against it in this action is purely a question of California law. Similarly, it is California law which governs the question whether a grantee of property may raise for his own benefit the defense that the claimant would have been barred by the Statute of Limitations had he proceeded against the grantor alone. See *Johnson v. Ware*, 58 Cal. App. 2d 204, 136 P. 2d 101 (1943) (widow of deceased tenant-in-common may raise the Statute as a defense to a claim by the other tenant that the property had actually been held in joint tenancy).

Nor does the trial court's entry of judgment in favor of the Church conflict with *Fed. R. Civ. P.* 8(c). Nothing in that rule prohibits a court from entering judgment for a defendant when a co-defendant has successfully litigated issues which are common between them. Petitioner's citation of *Donovan v. Dallas*, 377 U.S. 408 (1964) is inapposite. That case merely held that a state court could not enjoin federal proceedings initiated by a plaintiff who had unsuccessfully litigated the same claim in the state court. The proper procedure, this Court said, was for the defendants to raise the defense of *res judicata* in the federal action.

As for the second issue, raised for the first time in oral argument before the Ninth Circuit, Respondent respectfully submits that it is solely a question of California law whether its intervention in the state court proceeding tolled the two year Statute of Limitations for the purposes of the present action. Even if this argument had been presented to the trial court, Petitioner has not explained how it would have created any issue of fact which would have warranted the denial of summary judgment.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRA M. PRICE II,
PHILIP F. BELLEVILLE,
JOSEPH A. WHEELOCK, JR.,
LATHAM & WATKINS,
Attorneys for Respondent Jackson Appliance, Inc.